Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
	)	
Implementation of the Non-Accounting	)	
Safeguards of Sections 271 and 272 of	)	CC Docket No. 96-149
the Communications Act of 1934,	)	
as amended	)	
	)	
and	)	
	)	
Regulatory Treatment of LEC Provision	)	
of Interexchange Services Originating	)	CC Docket No. 96-61
in the LEC's Local Exchange Area	)	

Petition for Reconsideration of ALLTEL Communications, Inc.

Glenn S. Rabin
Federal Regulatory Counsel
ALLTEL Corporate Services, Inc.
655 15th Street, N.W.
Suite 220
Washington, D.C. 20005
(202) 783-3976

August 4, 1997

SUMMARY

ALLTEL seeks reconsideration of the Commission's recent Order in this proceeding to the extent it requires continued separations in the provision of in-region interexchange service by independent LECs. The Commission must squarely address the special circumstances presented by companies with less than two percent of the nation's access lines in the provision of in-region, interstate, interexchange service. These companies provide interexchange service largely as resellers inasmuch as their existing local exchange territories do not cross LATA boundaries. Consequently, the Commission's concerns over the potential for the two percent companies to leverage their local exchange territories and engage in anticompetitive conduct in the interexchange market are unfounded. Indeed, the provision of in-region interexchange service by a two percent company without interLATA facilities of its own is more analogous to the out-of-region situation in which the Commission found no need for the continued imposition of the Competitive Carrier Fifth Report and Order separations.

The Commission has adequate safeguards in place, including the Part 64 cost allocation process, to police anticompetitive conduct. Other safeguards, including those contained in the Telecommunications Act of 1996, continue to protect competition in the interexchange market.

TABLE OF CONTENTS

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
	)	
Implementation of the Non-Accounting	)	
Safeguards of Sections 271 and 272 of	)	CC Docket No. 96-149
the Communications Act of 1934,	)	
as amended	)	
	)	
and	)	
	)	
Regulatory Treatment of LEC Provision	)	
of Interexchange Services Originating	)	CC Docket No. 96-61
in the LEC's Local Exchange Area	)	

Petition for Reconsideration of ALLTEL Communications, Inc.

ALLTEL Communications, Inc. ("ALLTEL")[1], pursuant to Section 1.429 of the Commission's rules, hereby seeks reconsideration of the Order adopted in the above-captioned proceeding[2] insofar as it provides for the continuation of regulatory safeguards

[1] ALLTEL Communications, Inc. is the corporate entity through which the various affiliates and subsidiaries of ALLTEL Corporation provide communications services on a competitive basis. The various affiliates and subsidiaries of ALLTEL Corporation which serve as FCC licensees currently remain intact for Commission licensing and reporting purposes.

[2] In the Matter of Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange MarketPlace, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, FCC 97-142 (Released April 18, 1997) (the "Order"). Federal Register Publication of the Order occurred on July 3, 1997. See 62 Fed. Reg. 35974 (1997). ALLTEL participated in the underlying rule making in CC Docket No. 96-61. ALLTEL is also a member of the United States Telephone Association ("USTA") and the Independent Telephone & Telecommunications Alliance, both of which submitted comments in CC Docket No. 96-149.

in the provision of certain interexchange services by independent local exchange carriers with less than two percent of the nation's access lines (the "two percent companies"). In support thereof, the following is respectfully set forth.

I. Introduction.

ALLTEL urges the Commission to reconsider its decision to continue the applicability of outmoded separations requirements to the two percent companies in accordance with recently restated Congressional intent[3] and within the confines set by the need for agencies to articulate a rational connection between the facts on the record and the regulatory choice made. The Commission is under the obligation to re-examine its approach where factual assumptions which support an agency rule are no longer valid and where it appears the rule no longer serves the public interest.[4]

The net result of the Commission's Order is to retain a status quo of thirteen years standing for independent LECs providing in-region interexchange service under the Competitive Carrier Fifth Report and Order.[5] Admittedly, at the time of the AT&T

---

[3] Letter dated June 25, 1997 to The Honorable Reed E. Hundt, Chairman, from U.S. Representatives Tauzin, Oxley, Boucher, Dingell et al. at page 2. Among other things, the letter noted that Congress made a conscious decision to apply explicit safeguards for the provision of interexchange only to service to a single class of carriers composed solely of the Bell Operating Companies (the "BOCs"). Congress rejected the imposition of separations safeguards on independent LECs.

[4] See generally, Cincinnati Bell Telephone v. FCC, 69 F3d 752 (6th Cir 1995). The Commission has long acknowledged this same obligation. Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Fourth Report and Order, CC Docket No. 79-252, 95 FCC 2d 554 (1983) (the "Competitive Carrier Fourth Report and Order") at para. 38.

[5] Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Fifth Report and Order, CC Docket No. 79-252, 98 FCC 2d 1191 (1984) (the "Competitive Carrier Fifth Report and Order"). ALLTEL notes that the Competitive Carrier Fifth Report and Order's purported clarification of the requirements for a separate affiliate never explicitly required that the affiliate be a distinct corporate legal entity. Rather, the Order's requirements at para. 165 to that effect appear to have had their genesis in Bell Operating Company Provision of Out-of-Region Interstate, Interexchange Services, Report and Order, CC Docket No. 96-21, FCC 96-288 (released July 1,

divestiture and nascent long distance competition, the separations in the Competitive Carrier Fifth Report and Order made sense. In the intervening years, however, long distance competition has flourished and once small competitors have now grown into huge carriers no longer in need of the Commission's regulatory largesse. Further, the years since the Competitive Carrier Fifth Report and Order have seen the formulation, implementation and refinement of additional regulatory and statutory safeguards. Most significant among these are the equal access and accounting rules as well as the new obligations imposed on all incumbent local exchange carriers under the Telecommunications Act of 1996.[6] These refinements more than adequately address the concerns cited by the Commission in support of the continuation of the separations requirements. Given the absence of documented abuse and the sufficiency of existing safeguards, ALLTEL believes the separations requirements should be eliminated for independent LECs, but particularly for the two percent companies.

II. The Commission's Order.

The Commission concluded that independent LECs should not be regulated as dominant carriers in their provision of in-region, interstate, interexchange service (despite the Commission's redefinition of the market) because its analysis of traditional market power factors (other than bottleneck control) suggested that independent LECs lack the

---

1996) ("Interim BOC Out of Region Order") at para. 22. Putting procedural issues to the side, ALLTEL believes that any new requirement that the affiliate be a distinct legal corporate entity is burdensome and does nothing to provide any added degree of protection against the purposed evils which, in the Commission's view, stem from local exchange operations.

[6] Public Law No. 104-104 (1996)

ability to profitably raise and sustain prices above competitive levels by restricting their output .[7]

The Commission, however, further concluded that while an independent LECs control of local exchange and exchange access facilities did not enable them to profitably raise and sustain prices, it potentially enabled them to misallocate costs from their in-region, interexchange services, discriminate against rivals of their interLATA affiliates, and engage in other anticompetitive conduct such as price squeezes.[8] In order to mitigate this potential for competitive abuse, the Commission found it necessary to preserve the Competitive Carrier Fifth Report and Order separations requirement as a condition for non-dominant regulatory treatment for the provision of in-region, interstate, interexchange services by independent LECs.[9] In doing so, the Commission rejected the arguments of independent LECs distinguishing the nature of their service territories and their lack of ability to engage in the very conduct with which the Commission was concerned.[10]

The Commission further refused to provide relief from the separations requirements for those independent LECs with fewer than two percent of the nation's

---

[7] See Order at para. 157.

[8] See Order at para. 163. ALLTEL notes that the Commission adopted the same non-accounting safeguards for the provision by independent LECs of in-region international services. While ALLTEL focuses its request for reconsideration on the provision of domestic in-region interstate, interchange services, its arguments apply with equal urgency to the provision of in-region international services. Consequently, should reconsideration be granted regarding the safeguards applicable to the domestic market, ALLTEL believes the FCC should similarly reconsider its rules for the international market.

[9] See Order at para.163. ALLTEL notes, however, that the Competitive Carrier Fifth Report and Order separations requirements are, in practice, mandatory given the new mandate that independent LECs provide in-region, interstate, interexchange service only through a separate affiliate on a non-dominant basis. Order at para.173.

[10] See Order at paras. 146-147.

access lines finding that neither a carrier's size nor its geographic characteristics affect its ability to improperly allocate costs or discriminate against rival interexchange carriers.[11]

The Commission, however, eliminated the separation requirements imposed on the BOCs and the independent LECs as a condition for non-dominant treatment of their provision of out-of region interstate, domestic, interexchange services after finding that various concerns raised respecting the BOCs' and independent LECs' ability to leverage their in-region local exchange monopolies to disadvantage competitors in the out-of - region market were unfounded.[12]

ALLTEL does not seek reconsideration of either the Commission's analysis or its conclusions that independent LECs lack sufficient market power in the in-region and out-of-region interstate, interexchange marketplace to justify their regulation as dominant carriers. Indeed, ALLTEL commends the Commission for its realization that the Competitive Carrier Fifth Report and Order separations are no longer required for the provision of out-of-region, interstate, interexchange service for any LEC, whether a BOC or an independent company.

---

[11] See Order at para. 183. The Commission expressly rejected a rule that exempted all LECs with less than two percent of the nation's access lines because it would "essentially eviscerate our regulation of independent LECs" and " exempt all 1100 independent LECs except the GTE companies (approximately 12 percent) and the Sprint/United companies (approximately 4 percent)". Order at fn. 517. This was essentially the only analysis which the Commission devoted to the special circumstances of the so-called two percent LECs as opposed to independent LECs generally. The Commission chose to focus on the number of companies which would be relieved of regulation rather than the underlying need for the continued regulation of these companies in the first instance.

[12] See Order at para. 211.

In ALLTEL's judgment, however, the Commission must squarely address the special characteristics of the independent telephone companies and particularly those of the two percent companies. The manifest differences in the size, scope and scale of the two percent companies' service territories present a locus of special circumstances which clearly differentiate them, and their potential for anticompetitive mischief, from the Bell Operating Companies and the far larger independent LECs. The Commission cannot simply ignore these obvious differences; it must differentiate among carriers and impose the appropriate level of regulation (or forbearance) based not upon an amorphous, theoretical threat to competition, but rather upon real-world facts and the record.

The Commission notes that there have been few, if any complaints, against the independent LECs during the years in which the Competitive Carrier Fifth Report and Order requirements have been in effect.[13] It would be wrong, however, to attribute this success to the separations requirements. ALLTEL notes that independent LECs have been providing other competitive services, such as CMRS, without either a Commission imposed separations requirement or carrier complaints. Regrettably, in the instance of CMRS, the lack of a separations requirement is currently subject to challenge. See, In the Matter of Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services, WT Docket 96-162, 61 Fed. Reg. 46420 (September 3, 1996)

ALLTEL therefore seeks reconsideration of the Commission's decision to continue the application of the Competitive Carrier Fifth Report and Order separations to

[13] See Order at para. 165.

the provision of in-region interstate, interexchange service by the two percent companies as well as the Commission's decision to make such separations mandatory. Further, ALLTEL seeks reconsideration of the Commission's refusal to sunset the separations requirements for independent LECs particularly where the Bell Operating Companies will be relieved of safeguards within three years by virtue of the statutory sunset contained in Section 272(f)(1) of the Communications Act.[14]

III. The Realities of the Provision of Interexchange Service by the Two Percent Companies Obviate the Need for Continued Separations.

There are abundant and manifest differences between two percent companies and larger LECs which, upon examination, obviate the need for continuation of the Competitive Carrier Fifth Report and Order separations. Most significant among these is the fact that two percent companies, with few exceptions, do not operate local exchange territories which traverse LATA boundaries, and consequently, have no interLATA facilities of their own. Given the discrete, largely rural and geographically dispersed nature of these local exchange territories, the notion that these companies have "regions" is a misnomer, despite the Commission's focus on regional power as a cornerstone of its competitive analysis. These carriers operate as resellers of interLATA services both in the intrastate and interstate markets.[15] This central fact alone[16] drastically reduces the incentive for, and ability of, a two percent company to engage in the anticompetitive

---

[14] See Order at paras. 193-196.

[15] ALLTEL notes that it currently provides its interLATA offerings on a strictly resale basis.

[16] ALLTEL notes that this central fact is largely unnoticed in the Commission's discussion of the purported competitive harms which independent LECs may bring to the in-region interexchange market place although it was noted in comments as a justification for the removal of separations. See Comments of USTA in CC Docket No.96-149, filed August 29, 1996.

conduct supporting the Commission's rationale for the continuation of the separations requirements.[17] Indeed, the provision of interexchange services exclusively through resale places the two percent companies on virtually the same footing with respect to the provision of in-region and out-of-region interexchange service. Notably, in the later case the Commission found no need to continue the separations requirements.[18]

The Commission's rationale for the retention of the Competitive Carrier Fifth Report and Order's separations focuses on three purported ways in which an independent carriers may disadvantage competitors in the interexchange market:[19] 1) discrimination on terms of interconnection; 2) misallocation of costs between regulated, non-competitive and unregulated, competitive activities; and 3) price squeezes. On the basis of the clearly discernible facts underlying the two percent companies provision of in-region, interLATA interexchange services, none of these concerns is of sufficient moment to justify the continued imposition of the separations.

A. Interconnection. An independent LEC providing interexchange service through resale cannot discriminate against its rivals on interconnection. First, an ILEC cannot discriminate in favor of its own interexchange facilities if it has no such facilities in

---

[17] The Commission distinguished resellers from other carriers in the Competitive Carrier Fourth Report and Order 95 FCC 2d 554 (1983) at para. 35. (" We distinguished resellers from other non-dominant carriers in that resellers do not own their own facilities; the underlying carriers' rates act as a 'just and reasonable ' ceiling on resellers' rates, and the resellers cannot affect the availability to the public of services via underlying facilities.")

[18] See Order at paras. 197-213. Given the small, discrete and rural nature of their service territories, it is highly unlikely that a two percent company could affect both originating and terminating access on the same call. An in-region independent LEC reseller therefore presents a situation more analogous to the out-of-region provision of interexchange service and the Commission's rationale in that later case is equally applicable to in-region resale.

[19] See Order at para. 163.

the first place. Second, given the detailed requirements and procedures of the 1996 Act, it is virtually impossible for a two percent LEC to discriminate against, or in favor of, the very interexchange carrier or carriers whose service it resells. The Act now requires that interconnection agreements be made public and embody the requirement of non-discrimination. These arrangements are policed by the carriers themselves, the states or, in face of state inaction, by the Commission itself. It is impossible for a two percent LEC to discriminate against its underlying interexchange carrier without discriminating against its own interexchange offering.

Further, even before the passage of the 1996 Act, the Commission had adequate safeguards and authority to police the threat of discrimination. The still effective Equal Access Order[20] set out the time frame in which all independent LECs were to convert their switches to equal access as well as a detailed standard for non-discrimination. The Competitive Carrier Fourth Report and Order details the sources of further Commission authority (left untouched by the 1996 Act) to police allegations of anti-discrimination, including a complaint process. Discrimination by two percent companies is no longer a threat.

B. Misallocation. As noted above, the Commission has over the course of the last decade developed, implemented and refined the detailed accounting requirements contained in Part 64 of the Commission's rules. These rules require carriers to clearly separate and allocate the costs of services between regulated and non-regulated activities. These rules, as the Commission has acknowledged, provide adequate protection against

[20] MTS and WATS Market Structure Phase III, Report and Order, CC Docket No. 78-72, Phase III, 100 FCC 2d 860 (1985) ("Equal Access Order") at para. 48.

misallocation and cross subsidization of regulated and non-regulated services.[21] This is particularly true in the case of the two percent companies who provide interexchange services exclusively through resale. In such instances, there is little danger of misallocating the costs of jointly owned switching and transmission facilities. The cost of the resold interexchange service is readily isolated and is therefore transparent to the Commission as well as any auditor.

C. Price Squeezes. The Commission's concerns over a two percent company engaging in a price squeeze is based in an unlikely scenario under which the independent LEC increases its access charges to all interexchange carriers (the "IXCs"). The IXCs are then faced with two alternatives: 1) an increase in retail rates to maintain profit margins with the attendant risk of losing market share; or 2) maintain retail rates while accepting a cut in profit margin.[22] The scenario is highly unlikely in the context of a two percent company's provision of resold interexchange service and presumes the concurrent failure of access charge regulation, the basic economic incentives of the 1996 Act and the failure of the underlying interexchange carrier to reflect the increase in access in wholesale rates.

Access charges are subject to detailed regulatory oversight, particularly for rate of return companies such as ALLTEL. These companies have a limited ability to alter their tariffed access charges without regulatory approval before which affected interexchange carriers have ample opportunity to protest. Even assuming, for the sake of argument, that

---

[21] Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996, Report and Order, CC Docket No. 96-150, FCC 96-490 (released December 24, 1996) at para. 75.

[22] Order at para. 161.

an independent LEC subject to rate of return regulation could unilaterally effect an arbitrary increase in access costs and charges[23] the 1996 Act, by virtue of its elimination of barriers to entry, interconnection provisions, and the deprivation of the LECs local monopoly franchise, provides CLECs and IXCs with the opportunity to construct their own facilities and by pass the LECs network. Consequently, were an independent LEC to unilaterally raise access charges, competitors would enter the market on a facilities based basis to undercut those prices. Thus the 1996 Act's market-based mechanism therefore serves the dual goal of restraining increases in access charges and the promise of facilities based competition.

Most significantly, where the two percent company is a reseller, an attempt to price squeeze promises to hoist the LEC upon its own petard. Inasmuch as the retail rate charged by the independent LEC is based upon the wholesale rate charged to it by the underlying IXC, any change in access rates would be reflected in the wholesale rate charged by the underlying IXC (and all other IXCs) thereby driving up the LECs costs. Without any facilities of its own, the two percent company would be unable to find any lower priced alternatives. The result would be an undesired increase in the LECs retail rate for the provision of interexchange services or a marked decrease in margin.[24] Neither result qualifies as an incentive for a two percent company to engage in a price squeeze.

---

[23] ALLTEL again notes that the segregation of regulated and non-regulated costs under the Part 64 rules provides ample protection against the inclusion of costs associated with non-regulated activities, such as long distance resale, from inclusion in the rate base for regulated behavior.

[24] ALLTEL notes that any attempt by an independent LEC reselling interexchange service to price squeeze would most likely be met with a response from the interexchange carriers to increase wholesale rates and thereby squeeze the profit margin of the underlying reseller. This oft cited complaint of resellers is no less applicable to two percent companies.

IV. Sunset Provision.

Section 272(f)(1) of the Communications Act provides a three year sunset for the safeguard provisions governing Bell Operating Company provision of in-region interexchange service unless they are otherwise extended by the Commission. Rather than place independent LECs on an equal footing, the Commission simply noted its intention to commence a proceeding in three years under which it will assess whether the emergence of competition in the local exchange and exchange access markets is sufficient to justify the removal of the separations requirements.[25] The import of the Commission's decision is to leave the independent LECs subject to regulation for a period of time potentially longer than that applicable to the Bell Operating Companies, the only class of companies upon which Congress imposed separations.

The sunset issue would effectively be mooted should the Commission reconsider the continuation of the Competitive Carrier Fifth Report and Order separations. Should the Commission chose to retain it current requirements, basic fairness, at a minimum, requires that independent LECs also be afforded a sunset.[26]

V. Conclusion.

ALLTEL believes the continuation of the Competitive Carrier Fifth Report and Order separations to be generally unnecessary for independent LECs and, in particular, the two percent companies. The protections of the Act and existing Part 64 accounting rules provide adequate protection against the potential anticompetitive conduct of concern to

---

[25] See Order at para. 196.

[26] In this connection, ALLTEL again notes the June 25, 1997 letter of Congressman Tauzin, Dingell, Oxley, Boucher et.al.

the Commission, particularly where the LEC provides interexchange service as a reseller. Ultimately, ALLTEL believes that a LEC's business plan, and not Commission mandates, should dictate whether or not it offers non-dominant interexchange service through a separate affiliate. ALLTEL asks the Commission to remove regulation which has been overtaken by time and circumstance. The separations requirements should be removed.

Respectfully submitted,

ALLTEL Communications, Inc.

By: _____

Glenn S. Rabin
Federal Regulatory Counsel

ALLTEL Corporate Services, Inc.
655 15th Street, N.W.
Suite 220
Washington, D.C. 20005

(202) 783-3976

Dated: August 4, 1997